

CRIMINAL APPEAL No.333 OF 1993

(Against the Judgment and Order dated 30.09.1993 passed by Sri Hari Shankar Prasad, 6th Additional Sessions Judge, Bhagalpur in Sessions Case No. 16/1986)

JAINUL MANSOOR, SON OF MAKBOOL MANSOOR, RESIDENT
OF VILLAGE-KHIRIDANR, P.S. SANOHULA, DISTRICT-BHAGALPUR

-----Appellant

Versus

THE STATE OF BIHAR

-----Respondent

For the appellant: - Mr. Manohar Prasad Singh, Advocate

For the State : - Mr. Dashrath Mehta, A.P.P

P R E S E N T

THE HON'BLE MR. JUSTICE DHARNIDHAR JHA

Dharnidhar Jha, J.

The solitary appellant along with six others was put on trial by the learned 6th Additional Sessions Judge, Bhagalpur in Sessions Trial No. 16 of 1986 for charge under Section 307 IPC which was framed against the appellant and was found guilty of committing the offence under Section 324 IPC by the judgment passed in the above noted case on the 30th of September, 1993. The other accused persons who had been charged along with the appellant under Section 307 IPC read with Section 149 IPC were acquitted of the charge. The appellant was directed to suffer rigorous imprisonment for a period of two years by the learned trial Judge. The above noted judgment and order of conviction passed upon the solitary appellant is being questioned in the present appeal.

In fact there were 8 named accused in the F.I.R. but Mobarak

Mansoor, one of the 8 accused persons, died during the trial and, as such, it proceeded only against 7 accused persons.

P.W. 8 Khurshid Alam, the informant of the case, filed his written report (Ext.2) at the Police Station alleging that his father was demolishing his wall on 07.10.1984 at 7.30 A.M. when the accused persons objected to it telling that there was a dispute for the wall between the parties. The father of the informant P.W. 1 Md. Allauddin did not relent from demolishing the wall upon which, it is alleged, that this appellant dealt a farsa blow on the head of P.W. 1 as a result of which he fell down unconscious and was shifted to a doctor and the written report was lodged.

On the basis of Exhibit-2, the F.I.R. of the case was drawn up and the investigation was taken up by the Police and after close of the same 8 accused persons named in the F.I.R. were sent up for trial which ultimately ended in acquittal of six accused persons and in conviction of the present appellant as indicated above.

The defence of the appellant was that the land over which the wall was standing had been purchased by his father way back in 1957 and he had his house, darwaza and few palm trees over it and by false and unfounded claims the injured P.W. 1 and his son and others attempted to demolish the wall so as to exercising their act of possession over it. What appears from the trend of cross-examination of defence witnesses is that the appellant by implication took up a plea of exercising his right of private defence of property against the trespassers like P.W. 1 and others.

9 witnesses were examined by the prosecution in support of the charges. P.W. 1 Md. Allauddin is the injured of the case who happened to be the father of the informant P.W. 8. P.W. 2 Naresh Tanti, P.W. 3 Ganesh Tanti are full brothers between them. They along with P.W. 6 Bouni Tanti are eye witness to the occurrence. P.W. 4 Kailash Tanti was tendered for cross-examination along with P.W. 7 Muni Mansoor. P.W. 5 Purusottam Prasad was a witness of formal character who proved the signature of a Police Officer on the F.I.R. which signature has been marked as Ext.1. P.W. 9 was the doctor, namely, Dr. Shashi Kumar Chaudhary who had examined the injured (P.W. 1) and issued the report (Ext.3).

Besides the above oral evidence, the prosecution tendered Ext.4, the khatian in respect of the disputed land and order passed in a case under Section 107 Cr.P.C. It has been marked as Ext.-5. The notice issued under Section 107 Cr.P.C. in respect of the case concerning Ext.-5 was also tendered as Ext.-6 for the prosecution.

The two defence witnesses examined by the appellant are on possession of land by the appellant over which the dispute was raised by the informant and others, besides on the part of the defence plea that the informant and his father attempted to take possession of the land belonging to the appellant. The defence exhibited the **Kebala** by which the land was purchased by the father of the appellant on 18.10.1957 and that document has been marked Ext.-A.

The learned Judge after consideration of the evidence of the

sides passed the impugned judgment.

I was taken through the evidence of witnesses by the learned counsel appearing for the appellant and it was contended by the learned counsel for the appellant that there were three injuries found on the person of P.W. 1 out of which two were incised and the other was an abrasion, but the written report contains the story of solitary blow by farsa wielded, allegedly, by the appellant upon P.W.1. It was also contended that the witnesses have admitted directly or indirectly that the land was purchased by the father of the appellant way back in 1957 and the evidence in cross-examination of the witnesses raised an inference that the wall could not be belonging to the informant or his father but to the accused persons and that the informant and his father could be trespassers over the piece of property and were also committing the act of mischief by demolishing the wall. Contention was also that the learned Judge who passed the order undermined the clear inferences emerging out of the categorical admissions of witnesses and missed to read the provision of Sections 97 and 99 of the Penal Code and thus failed in extending the benefit of acting in exercise of right of private defence of property.

Witnesses have stated, as may appear from the evidence of P.Ws. 1, 8, 2, 3 and 6, that the appellant dealt two farsa blows one on the hand of the injured and the second on his head whereafter he felled down and became unconscious to regain consciousness only when he was in the hospital. This story of two assaults which the

witnesses stated in the court below appears not made in the written report which was filed by the informant after the incident. But, that does not appear of much importance inasmuch as while cross-examining P.W.1, 2, 3, 6 and 8 no attention of any the witnesses was drawn to any fact suggesting that the statement disclosing two blows with farsa had not been made by any of them at the earliest before the Police. However, when one considers the evidence of P.W. 2 Naresh Tanti, P.W. 3 Ganesh Tanti and P.W. 6 Bauni Tanti, one could find that all of them stated that they had never made any statement before the Police and that they were making statements for the first time in Court (Please see P.Ws. 2 and 3 in their paragraph-5 & P.W. 6 in paragraph-6). Thus the evidence of P.Ws. 2, 3 and 6 is inadmissible making their statement of no value at all.

It leaves me to consider the evidence of P.Ws 1 & 8, the father and the son. They appear giving evidence of equal value as was done by P.Ws. 2, 6 and 3 that the appellant dealt two farsa blows on P.W.1 but when one considers the evidence of P.W. 8 in the light of some of the admitted facts by P.W. 1 one could find that the evidence of P.W.8 could never be accepted. The simple fact is that P.W. 1 admitted in paragraph-8 of his evidence that wife of Bouku had sold 7 decimals of the disputed land through sale deed (Ext.-A) in 1957 to Maqbool Ansari the father of the appellant. P.W. 8 Khursheed Alam, on the other hand, showed his ignorance as to what was the nature of property and rather claimed that he had the document in his possession in respect of the property. This could be

available from paragraph-8 of P.W.8. The witness appears making a false statement on the most material part of the prosecution story. One of their own witnesses, Munni Mansoor (P.W. 7), who was tendered for cross-examination stated in evidence that the land over which the wall was standing belonged to Maqbool Ansari, the father of the appellant. Thus the evidence of the prosecution as coming from P.Ws. 1, 8, 7 and 6 appears contradicting each other on the most material point.

It is true that the doctor had found three injuries two sharp cut wounds and an abrasion being found on the head and left hand of the injured but that by itself could not be enough to uphold the judgment. From the evidence of the prosecution it was established that the land over which the wall was standing belonged to the accused. This could be found from the evidence of the witnesses like P.Ws. 3 and others. The picture emerging from the evidence of the prosecution witnesses is that the wall in question which was being demolished was situated just South to the house of the appellant and to the north of that particular wall a barren land was situated and that also belonged to the appellant. Thus there was a continuous land belonging to the appellant on either sides of the wall. There is no story that any part of that particular or on either sides of the wall including the wall was belonging to P.Ws. 1 or 8. If this could be the probability emerging from the evidence of witnesses, then it is an admitted fact that the informant and his father were demolishing the wall which could be belonging to the appellant.

An accused has right to defend his body or property as may appear from Section 97 of the IPC. The right to defend ones property, whether movable or immovable or of any other person against any act which is an offence falling within the definition of theft, robbery, mischief or criminal trespass or which could be an attempt of committing of any other offence is protected by virtue of the provisions aforesaid of Indian Penal Code with an exception as is contained in Section 99 of the Indian Penal Code.

Section 99 of the Indian Penal Code can not be invoked as an exception in a case like present one, expect that the prosecution may raise a plea that the extent to which the right was exercised by the accused was not protected by Section 97 and Section 99 of the Indian Penal Code. The prosecution could very well argue in an appropriate case that the right of private defence of property had been exceeded by an accused by inflicting more harm than was necessary to be inflicted for the purpose defending one's property. It is too well known to be reiterated that when one is faced with a situation of trespass over his property or when one is faced with the act of mischief of some persons or the other towards one's property as in the present case, one cannot be expected to take recourse to law and could very well be justified in using force to repel the trespassers from his rightful property. When one is exercising such a right in such an emergent situation, one could not be expected to weigh his blows in golden scales. Coming to the evidence, the first blow was given by the appellant Allaudin on the left hand of P.W. 1.

He did not fall. Other blow was wielded by the appellant on his head when he had fallen down having received that blow. It appears from the evidence that on falling down he became unconscious after he was hit with farsa blow on his head by the accused. There is no evidence nor there was any story initially or afterwards that the appellant had dealt any further blows on P.W. 1. Thus the appellant could not be said to have exceeded the right permissible to exercise of Sections 97 and 99 of the Indian Penal Code within the meaning as he was acting by not exceeding the same.

The facts were too glaring, the provision of law so clear. The learned Additional Sessions Judge missed both the facts and the law. He, thus, went on to record the illegal conviction of the appellant.

In the result, the appeal is allowed. The judgment and order of conviction as also that of sentence are hereby set aside. The appellant is acquitted of the charge. He is on bail. He is discharged from the liability of his bond.

(Dharnidhar Jha, J.)

**Patna High Court
Dated the 2nd
March, 2009
AFR/S.Sb**